

VIA FACSIMILE TO (202)-501-1836, (202) 501-1450 AND CERTIFIED MAIL

April 19, 2002

Karen Higginbotham, Acting Director
Office of Civil Rights
Ariel Rios Building
200 Pennsylvania Avenue, N.W.
Washington, DC 20460

5R-02-R9

Governor Christine Whitman, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: *Concerned Residents of South Phoenix, Inc. v Arizona State Emergency Response Commission and Maricopa County Local Emergency Planning Committee*

Dear Acting Director Higginbotham and Governor Whitman:

The Arizona State Emergency Response Commission (AZSERC) and the Maricopa County Local Emergency Planning Committee (MCLEPC) (as supported administratively by the Maricopa County Department of Emergency Management) have violated Title VI of the Civil Rights Act of 1964 and the Environmental Protection Agency's ("EPA") implementing regulation, 40 C.F.R. § 7.35, by discriminating on the basis of race in their administration of the requirements of the Emergency Planning and Community Right-To-Know Act (EPCRA).

A) The AZSERC has done this by failing to follow the requirements of EPCRA in a variety of ways.

1) The AZSERC has failed in its supervisory and oversight duties of the MCLEPC as required by Section 301 of EPCRA (42 USCA 11001) ["The State emergency response commission shall appoint local emergency planning committees under subsection (c) of this section and shall supervise and coordinate the activities of such committees."] Thus the AZSERC is in part responsible for the pattern of civil rights violations of the MCLEPC.

2) The AZSERC has failed in its supervisory and oversight duties of the MCLEPC as required by Section 303 (e) of EPCRA (42 USCA 11001) ["After completion of an emergency plan under subsection (a) of this section for an emergency planning district, the local emergency planning committee shall submit a copy of the plan to the State emergency response commission of each State in which such district is located. The commission shall review the plan and make recommendations to the committee on revisions of the plan that may be necessary to ensure coordination of such plan with emergency response plans of other emergency planning districts."] Thus the AZSERC is

in part responsible for the pattern of civil rights violations of the MCLEPC as the AZSERC has whatever the MCLEPC has submitted to the AZSERC.

B) The MCLEPC has failed to follow the requirements of EPCRA in a variety of ways. The MCLEPC has:

1) Failed to review the emergency plan it is required to prepare under Section 303 of EPCRA [42 USCA 11003 (a)] once a year or more frequently as changed circumstances in the community or at any facility may require.

There have been two serious toxic chemical fires in South Phoenix, an area with a documented concentration of industries and facilities with large hazardous chemical inventories (per Tier Two data) and proximate to low-income, ethnic minority communities. The South Phoenix area received the designation of the area by USEPA as a High Risk/High Priority Area for these exact reasons. The two serious chemical fires both occurred within the last decade, the most recent in August 2000. This August 2000 fire involving the Central Garden and Supply warehouse is the proximate cause of 1400 claimed civilian injuries, over 40 police injuries, and several firefighter injuries, all from exposure to toxic chemicals released during the fire. This type of serious chemical disaster occurring twice within a decade in an area where there is already a large concentration of industries reporting EHS and immediately proximate to low-income and ethnic minority communities would and should warrant a serious examination and review of any LEPC's Section 303 emergency plan.

Yet, the MCLEPC has not reviewed its Section 303 emergency plan in the context of the emergency response problems and issues associated with either toxic fire event, the latest of which involved a CERCLA 103 release of 21 CERCLA hazardous substances. There are issues that have not been addressed or updated, yet required as elements of any LEPC's Section 303 emergency plan, elements such as:

- the identification of additional facilities (schools, homes, day care centers) subjected to additional risk due to their proximity to facilities subject to EPCRA 302 (EHS) reporting requirements;
- procedures providing reliable, effective, and **timely notification** by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, **and to the public**, that a release has occurred;
- methods for determining the occurrence of a release;
- methods for determining the area or population likely to be affected by such release;
- evacuation plans; and
- training programs, including schedules for training of local emergency response and medical personnel; and methods and schedules for exercising the emergency plan.

In the "medical" response to the Central Garden fire, a variety of local and state agency staff passed out fliers suggesting affected members of the public seek medical attention at a clinic funded by Central Garden, a medical facility lacking the proper credentials and staff to diagnose, treat, and otherwise identify chemical exposure injuries. Yet this is not

what the emergency plan for the state and county is supposed to be concerning medical issues. Instead, doctors and physicians are to be offered free consultations regarding diagnosis and treatment of medical conditions caused by exposure to chemicals released during such a chemical disaster, and the affected public is supposed to be directed to see their own doctors or physicians. This latter medical response system, which is funded by tax dollars and is supposed to be the appropriate medical "response" to these situations, has never and was never communicated to the public, doctors, and physicians. The issue of inappropriate referrals to a clinic funded by a private entity instead of the proper medical response has never been formally discussed or reviewed by the AZSERC or MCLEPC. In the event a similar disaster occurs, there is no reason to believe the appropriate medical response will be implemented.

After two serious chemical fire disasters in South Phoenix within a decade, it is inappropriate that there has never been a drill in South Phoenix involving the public and regarding mass evacuation or shelter-in-place techniques.

And it is also inappropriate that, during these two serious toxic chemical fires, the Maricopa County Emergency Operations Center (MCEOC) wasn't activated. During the more recent toxic fire, which burned for several hours, runways of the nearby Sky Harbor Airport were closed, the adjacent freeway was closed, the plume of toxic smoke went 30 miles, and there were other serious effects. It is questionable why there has not been any review or critique of this and the underlying policies that prevented this MCEOC activation. There was a disparate impact on the affected community that was caused by the failure of MCDEM to activate the MCEOC. There still has been no MCLEPC discussion about what are the specific criteria for MCEOC activation in light of the Central Garden fire events and the Quality Printed Circuits fire event. If the MCEOC wasn't activated during this recent chemical fire, or the Quality Printed Circuits fire, what type of local chemical disaster or event is needed to cause MCEOC activation?

The MCLEPC, as directed and dictated by Robert Spencer of the Maricopa County Department of Emergency Management, refuses to discuss the Central Garden fire matter and associated issues or place the discussion on the MCLEPC agenda, despite the public request from affected community members, almost all of whom are African American or Latino. Indeed, after requests by affected area (African-American) residents, the Chair of the MCLEPC, Robert Spencer of the Maricopa County Department of Emergency Management, placed the discussion of the Central Garden fire on the April 3, 2002, MCLEPC meeting agenda, communicated to affected area residents that this was going to be on the April 3, 2002, MCLEPC meeting agenda, and then removed it. After the Call to the Public at the end of the April 3, 2002, MCLEPC meeting, during which many African American residents appealed to the MCLEPC to place the matter of the review of the Central Garden fire on the next MCLEPC's agenda, and even after a member of the MCLEPC (and a resident of the affected area) specifically asked Mr. Spencer to place the discussion on the next MCLEPC meeting agenda, Mr. Spencer refused. These events have thus occurred within 180 days. The acts of omission, of course, continue and are ongoing.

Also, a list of questions was submitted in March 2002 regarding the Central Garden fire

and specifically related emergency response and planning issues to the MCLEPC/Robert Spencer and the MCLEPC was asked for a response. There has been no response. And these questions were also not addressed during the April 3, 2002 MCLEPC meeting. The rules adopted by the MCLEPC in 1998 (and still unamended) require a response within 60 days.

By refusing to review the Section 303 emergency plan in the context of the issues associated with this fire, the MCLEPC continues to place this community, now devastated by two chemical fires, at a disproportionate, adverse risk due to the apparent deficiencies in the MCLEPC emergency plan. By refusing to discuss this matter or to place it on the MCLEPC's agenda, and especially after receiving allegations that this violates the civil rights of affected area residents, it becomes an intentional violation. Even if the USEPA fails to understand the deliberateness and intent of the refusal of Mr. Spencer and the MCLEPC to discuss the matter, Concerned Residents of South Phoenix (CRSP) wants to incorporate the materials that are posted to the EPA's own website regarding civil rights violations, (Emphasis added.)

"EPA's Program to Implement Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 is a federal law that prohibits discrimination on the basis of race, color, or national origin in all programs or activities receiving federal financial assistance. Title VI itself prohibits intentional discrimination.

The Supreme Court has ruled, however, that Title VI authorizes federal agencies, including EPA, to adopt implementing regulations that prohibit **discriminatory effects** as well as intentional discrimination. Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative."

2) The MCLEPC's Section 303 emergency plan has never ever been reviewed in its entirety at a properly noticed public meeting with an opportunity for the public to comment or otherwise participate. Indeed, there has never been an occasion at an MCLEPC meeting where the Section 303 emergency plan has been discussed regarding its elements, its particulars, or deficiencies. Besides the instant case, this has serious implications for other low-income, ethnic minority communities in Maricopa County because, overwhelmingly, the EHS facilities in Maricopa County are concentrated in or proximate to low-income, ethnic minority communities.

3) Failed to comply with the EPCRA Section 303 (b) [42 USCA 11003 (b)] requirement to evaluate the need for resources necessary to develop, implement, and exercise the emergency plan, and to make recommendations with respect to additional resources that may be required and the means for providing such additional resources.

Obviously additional resources are needed to prevent the continuing incidence of civilian injuries through improved notification systems, actual planning, evacuation plans and/or shelter-in-place plans, communications and training, training of medical personnel, and

other issues that would be properly researched by a review of the Quality Printed Circuits and Central Garden fire incidents.

4) The MCLEPC was the recipient of a written followup report filed by Central Garden and Supply. This written followup report was, however, entirely deficient in terms of what is required to be included as information. EPCRA Section 304 (c) [42 USCA 11004] requires the written followup emergency notice, and states, "As soon as practicable after a release which requires notice under subsection (a) of this section, such owner or operator shall provide a written followup emergency notice (or notices, as more information becomes available) setting forth and updating the information required under subsection (b) of this section, and including additional information with respect to -

- (1) actions taken to respond to and contain the release,
- (2) any known or anticipated acute or chronic health risks associated with the release, and
- (3) where appropriate, advice regarding medical attention necessary for exposed individuals."

The Quality Printed Circuits fire of 1992 involved a facility that filed Tier Two reports and was an EPCRA Section 302 EHS facility. The fire event itself involved a reportable quantity release of hydrogen fluoride and sulfuric acid. No written followup notice was ever provided by the facility. USEPA, in 2000, used CERCLA Emergency Response funds to decontaminate 180 homes and four schools in the affected area.

The MCLEPC, per the dictates of Robert Spencer, has never required a proper written followup notice by Central Garden and Supply, and again has even refused to discuss the deficiencies. The data in a written followup notice is necessary and required because of the importance of this data in recovering from a chemical release or disaster, including proper medical attention. The failure of the MCLEPC to require a complete and accurate written followup report is a proximate cause of unattended medical problems in the affected community, which as stated, is overwhelmingly low-income and ethnic minority.

I. PARTIES

A. Complainants

Concerned Residents of South Phoenix, Inc. (CRSP), an environmental justice organization with affected members residing in South Phoenix, is filing this complaint against the AZSERC and the MCLEPC. CRSP came together informally in 1992 after the first serious chemical fire, the Quality Printed Circuits (an EHS facility) fire of August 31, 1992. CRSP, which is almost entirely made up of African-American and Latino members, has held meetings in the community for almost a decade now regarding emergency planning issues, and some of its members have attended and made public comment at MCLEPC meetings over a period of years. Members of CRSP have made comments at different public meetings of the AZSERC and MCLEPC regarding inadequacies in the response to both chemical fire incidents, along with the associated lack of planning and response. Two CRSP members were also participants in the High Risk/High Priority Study.

B. Respondent Arizona State Emergency Response Commission (AZSERC) and Maricopa County Local Emergency Planning Committee (MCLEPC)

AZSERC is the state agency that is responsible for implementing, administering, and enforcing the EPCRA per 42 USCA 11001. The MCLEPC was also established per 42 USCA 11001.

The AZSERC, as a recipient of federal funds from EPA, is subject to the requirements of Title VI of the Civil Rights Act. The AZSERC passes federal funds from EPA through to the MCLEPC. The Maricopa County Department of Emergency Management, under the implementation of EPCRA in Arizona, provides "administrative support for the MCLEPC.

II. RIPENESS

This complaint comes as a result of recent incidents, after a history of incidents, where serious problems caused by chemical fire disasters remain unaddressed while the agencies created by the EPCRA fail to comply with their requirements. The failure of the AZSERC to properly supervise and coordinate the activities of the MCLEPC is causing and has caused a disproportionate, adverse effect on the low-income, ethnic minority community of South Phoenix. The failure of the MCLEPC to comply with its duties under EPCRA is causing and has caused a disproportionate, adverse effect on the low-income, ethnic minority community of South Phoenix. The AZSERC and the MCLEPC have been provided specific notice of the problem and deficiency, yet has not remedied the problem.

III. CONTEXT

Concerned Residents of South Phoenix, Inc. through some of its members has notified the AZSERC and the MCLEPC of the issues and problems as noted before in this complaint. The affected community of South Phoenix was obviously at risk as evidenced by the 1992 Quality Printed Circuits fire, and the 2000 Central Garden fire was an obvious update to the disparate risk this community is subjected to. The data about the chemical inventories in South Phoenix and the two fires is very well known by the AZSERC and the MCLEPC.

The area in South Phoenix affected by the Quality Printed Circuits fire includes census tracts 1160 and 1161. Census tract 1160, according to the 2000 Census, is overwhelmingly comprised of minority populations: 55.8% African-American, 39.3% Latino/Hispanic, and only 0.019% whites, while the white population is 63.8 % of the state's 5,130,632 residents. Maricopa County is comprised of 66.2% whites, 24.8% Latino/Hispanic, 0.035% African-Americans.

Census tract 1161, according to the 2000 Census, is also overwhelmingly comprised of minority populations: 18.9% African-American, 39.3% Latino/Hispanic, and only

0.026% whites.

The area in South Phoenix affected by the Central Garden fire includes census tracts 1160, 1161, and 1155. Census tract 1155, according to the 2000 Census, is also almost completely comprised of minority populations: 2.71% African-American, 74.2% Latino/Hispanic, and only 20.8% whites. Again, whites are 63.8% of the state's population and 66.2% of Maricopa County's population.

Claims

A. Title VI

Title VI of the Civil Rights Act of 1964 provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d.

The AZSERC, a direct recipient of federal financial assistance from EPA, and the MCLEPC, an indirect recipient of federal financial assistance from EPA as a recipient of pass through monies originally provided to the AZSERC, have violated Title VI as implemented through EPA's regulations by failing to meet the requirements of the EPCRA.

EPA must ensure that recipients of EPA financial assistance are not subjecting people to discrimination. In particular, EPA's Title VI regulations provide that an EPA aid recipient "shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." 40 C.F.R. § 7.35(b).

The failure of the AZSERC and MCLEPC to follow the requirements of EPCRA, as aforementioned that has had severe environmental and public health consequences in South Phoenix is the AZSERC and MCLEPC's method of discrimination, and is an extremely egregious example of their discriminatory practices. It is impossible for the AZSERC and the MCLEPC to claim that they have followed the requirements of the EPCRA.

All complainants must show is that when applied in a particular manner, the AZSERC and the MCLEPC's "method of administering its program" yields a discriminatory outcome. As the abovementioned sections demonstrate, the AZSERC and the MCLEPC's method of administering their EPCRA programs have resulted in discriminatory impacts throughout this low-income, ethnic-minority community. Also as noted above, Robert Spencer's refusal to place the issue of the Central Garden fire on the MCLEPC agenda now makes it an intentional violation.

The effect of AZSERC and the MCLEPC's administration of their planning programs as

required by the EPCRA is clear: People of color will bear disproportionate risks and impacts from releases of hazardous chemicals air pollution and the associated response, yet the planning agencies of jurisdiction will not properly administrate their respective programs and comply with applicable statutes as mentioned before in this complaint; and the AZSERC and the MCLEPC will not provide a means to decrease risks and impacts to this affected community.

By failing to comply with EPCRA, the AZSERC and the MCLEPC have administered their respective programs in such a way as to discriminate against people based on race, color, and national origin, in violation of Title VI.

Remedies

In order to provide effective remedies for the patterns of discrimination described in this complaint, the complainants request that EPA:

Require that, as a condition of continuing to provide federal financial assistance, the AZSERC and the MCLEPC immediately comply with the EPCRA and develop a method for citizens in the affected low-income and/or minority communities to dialogue with these agencies to seek a constructive method of reducing the risks and impacts of chemical disasters by changing the Section 303 emergency plan of the MCLEPC to:

- identify the additional facilities (schools, homes, day care centers) in the South Phoenix community subjected to additional risk due to their proximity to facilities subject to EPCRA 302 (EHS) reporting requirements;
- promulgate procedures providing reliable, effective, and **timely notification** by the facility emergency coordinators and the community emergency coordinator to persons designated in the emergency plan, **and to the public in South Phoenix**, that a release has occurred;
- promulgate and develop methods for determining the occurrence of a release in South Phoenix;
- promulgate and develop methods for determining the area or population likely to be affected by such release in South Phoenix;
- promulgate and develop evacuation plans in South Phoenix; and
- promulgate and develop training programs, including schedules for training of local emergency response and medical personnel; and methods and schedules for exercising the emergency plan in South Phoenix.
- Require that, as a condition of continuing to provide federal financial assistance, the AZSERC and the MCLEPC immediately develop a method to respond adequately and promptly to citizen complaints about these agencies noncompliance with the requirements of the EPCRA;
- Require, as a condition of continuing to provide federal financial assistance, that the AZSERC and the MCLEPC review their (lack of) planning activities as required under EPCRA in every low-income and ethnic minority community within their jurisdictions, and develop a competent, credible, scientific method of

determining they are not violating the civil rights of communities of color and/or low-income communities;

- Require, as a condition of continuing to provide federal financial assistance, that the AZSERC and the MCLEPC actively evaluate the need for resources necessary to develop, implement, and exercise the MCLEPC emergency plan, and make recommendations with respect to additional resources that may be required and the means for providing such additional resources in the context of the failings involved in the response to the Central Garden fire, including the additional resources that are needed to prevent the continuing incidence of civilian injuries during hazmat disasters in South Phoenix through improved notification systems, actual planning, evacuation plans and/or shelter-in-place plans, communications and training, training of medical personnel, and other issues;
- Permit complainants to initiate and engage in active, collaborative investigation of the foregoing allegations, including the submission of written interrogatories to AZSERC and the MCLEPC, and the MCDEM;
- Provide complainants with copies of all correspondence to or from the respondent throughout the course of the EPA's investigation, deliberation and disposition of this complaint;
- Request the AZSERC and the MCLEPC to end the discriminatory pattern of ignoring their requirements under the EPCRA in low-income and/or communities of color, and that, to this end, request that AZSERC and the MCLEPC use demographic data in considering the EPCRA Section 303 plan and updates;
- Sue to compel compliance with the law, to the extent that imposition of the foregoing remedies proves in any way to be ineffectual;
- Terminate its assistance to the AZSERC and the MCLEPC, pursuant to 40 C.F.R. §7.25, if the AZSERC and MCLEPC fail to implement the above requested changes.

Conclusion

As this complaint makes clear, the low-income, ethnic minority community of South Phoenix, Arizona typifies the low-income and/or communities of color burdened in Arizona by disproportionate adverse environmental impacts because of the AZSERC's and the MCLEPC's EPCRA Section 303 planning and review processes. Neither the AZSERC nor the MCLEPC have provided a credible mechanism for citizen complaints about EPCRA noncompliance. The discriminatory impact created and sanctioned by the AZSERC's and the MCLEPC's actions is a clear violation of Title VI as implemented by EPA regulations. Because the AZSERC and the MCLEPC receive federal funding from EPA, they are subject to Title VI as implemented by EPA regulations. This complaint is

timely filed since the AZSERC and the MCLEPC still do not comply with the requirements of EPCRA Section 303. And there is also a recent event when the MCLEPC failed to address the issues, having placed it on its quarterly meeting agenda for April 3, 2002, then removed it, and then refused to take the matter up for consideration at its next meeting, which was less than 180 days ago, and there has been no final agency action on this issue.

The Concerned Residents of South Phoenix, Inc. and its affected members look forward to an active investigation by EPA.

The complainants will be pleased to file further documentation of these claims as needed within the next few weeks, once EPA has specified to whom the documentation should be sent, and what further documentation is needed.

Sincerely,

Raymond C. Ferguson

Raymond C. Ferguson

For the Complainants
Concerned Residents of South Phoenix, Inc.
2701 East Mobile Lane
Phoenix, AZ 85040

~~602-861-9278~~

